Boston College Third World Law Journal

Volume 10 | Issue 2 Article 3

5-1-1990

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Recommended Citation

Pauline C. Reich, *After Avagliano v. Sumitomo Shoji America, Inc.: What Standard of Title VII Will Apply to Foreign-Owned U.S. Subsidiaries and Branches?*, 10 B.C. Third World L.J. 259 (1990), http://lawdigitalcommons.bc.edu/twlj/vol10/iss2/3

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AFTER *AVAGLIANO V. SUMITOMO SHOJI AMERICA, INC.*: WHAT STANDARD OF TITLE VII WILL APPLY TO FOREIGN-OWNED U.S. SUBSIDIARIES AND BRANCHES?

PAULINE C. REICH*

I. INTRODUCTION

In *Avagliano v. Sumitomo Shoji America, Inc.*, the United States Supreme Court held that the activities of foreign-owned, locally incorporated subsidiaries in the United States with respect to staffing and promotion of American employees were not exempt from the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964 (Title VII).[1] The question before the Court in *Avagliano* was whether a Japanese-owned company could assert a right under the U.S.–Japan Friendship, Commerce and Navigation Treaty of 1953 (U.S.–Japan FCN Treaty)[2] to exempt it entirely from domestic

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[1] 457 U.S. 176 (1982); Civil Rights Act of 1964, tit. VII, P.L. 352, 78 Stat. 241, (codified at 42 U.S.C. § § 2000e–2000e–17 (1981) [hereinafter Title VII].

[2] Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States–Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 [hereinafter U.S.–Japan FCN Treaty].

civil rights law. The Supreme Court held that such companies were not exempt. The Court also noted, however, that sometimes an employee's familiarity with home country language and culture might be necessary to perform a job.[3] The Supreme Court did not make a final determination of how the anti-discrimination requirements of Title VII should apply to each job in a Japanese-owned U.S. subsidiary of a general trading company, a distinctly Japanese type of business. Before each job's functions could be identified and presented to the district court on remand, the parties entered into a consent decree. Thus, no clear judicial guidance was given.

Due to a lack of clear guidelines, Japanese and other foreign-owned companies have interpreted their responsibilities under U.S. law in a variety of ways. Major Japanese securities firms have staffed their Wall Street offices with Americans up to the highest levels, including president and vice president. Japanese-owned insurance companies and banks have Americans, including minorities and women, at all levels of middle management and as in-house counsel.[4] Still other firms hire women only as secretaries, although in some cases they give them inflated job titles such as "assistant to the chairman" or "vice president."[5] The confusion on the part of foreign-owned companies is not limited to the Japanese. Greek, Indian, South African, and Korean companies have all recently been involved in litigation over the application of American anti-discrimination law to foreign corporations.[6]

This article will examine the *Avagliano* decision and the cases which arose before and after it. The questions which this article discusses include:

1) when, if ever, foreign-owned companies' subsidiaries and branches may insulate themselves from liability under the standards of Title VII which are applicable to domestically owned companies;

2) what standards justify staffing foreign-owned subsidiaries and branches with employees sent from the home country instead of with Americans;

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[3] *Avagliano*, 457 U.S. at 189 n.19.

[4] Nathans, *A Matter of Control*, BUS. MONTHLY, Sept. 1988. For example, at Sanwa Bank California, seven of ten top executives are American and at California First Bank three of eight top executives are American. Id. at 51.

[5] These practices have been the observations of the author.

[6] MacNamara v. Korean Air Lines, 863 F.2d 1135 (3d Cir. 1988), *cert. denied*, 110 S. Ct. 349 (1989); Helm v. South African Airways, 44 Fair Empl. Prac. Cas. (BNA) 261 (S.D.N.Y. 1987); Wickes v. Olympic Airways, 745 F.2d 363 (6th Cir. 1984); State Bank of India and Chicago Joint Board, Amalgamated Clothing and Textile Workers Union, AFL-CIO, 229 NLRB, No. 137 (May 20, 1977).

3) at what levels in the organizational structure home country nationals may be placed;

4) whether foreign-owned subsidiaries and branches are unique in their staffing needs for the U.S. market and whether a modified standard of Title VII should be applied to allow them to manage their U.S. investments, and;

5) when foreign-owned subsidiaries and branches should be given special exceptions and treaty protection from domestic standards.

The purpose of this article is not to engage in "Japan-bashing." The fact is that a number of Japanese-owned subsidiaries have been the subject of Title VII discrimination suits based on gender and race or national origin claims. The *Avagliano* case is currently the benchmark decision involving non-discrimination in the employment of Americans by foreign-owned U.S. companies.

II. The Japanese Corporate Presence in the United States

In 1987, it was estimated that there were 300,000 Americans employed in Japanese-owned firms in the United States.[7] The numbers are growing due to acquisitions by Japanese corporations fueled by a strong yen and the desire to avoid protectionist sentiments by manufacturing in the United States.[8] The trade imbalance between Japan and the United States is a matter of concern to both nations. Keeping pace with the growth of Japan's trade surplus, Japanese foreign direct investment in the United States has increased from $229 million in 1970 to a preliminary figure of $33 billion in 1987, including real estate investments.[9] This represented 7.85 percent of a total of $262 billion in foreign direct investment in the United States for the same period.[10]

As the Japanese equivalent of the Fortune 500 have set up subsidiaries, branches, and manufacturing plants abroad, in many instances they have exported Japanese-style labor relations practices.[11] These practices are characterized by harmonious relations between paternalistic management and workers pleased with their

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[7] L.A. Times, July 10, 1988, at A1, col. 1.

[8] *Id.*

[9] U.S. Dep't of Commerce, Bureau of the Census, Statistical Abstract of the United States 777 (109th ed. 1989).

[10] *Id.*

[11] *See, e.g.*, W. Gould, Japan's Reshaping of American Labor Law (1984); Nothstein and Ayres, *The Multinational Corporation and the Extraterritorial Application of the Labor Management Relations Act*, 10 Cornell Int'l L.J. 1 (1976).

work environment.[12] Some Japanese labor practices have been praised for improving productivity while maintaining morale. These include quality circles facilitating direct management-worker communication and innovation, and lifetime employment security. Such practices have been grafted on to the American employment system with varying degrees of success. Other Japanese practices are less adaptable to American labor law and social norms. For example, Japanese-owned corporations in the U.S. and in Japan traditionally have excluded women from all but the lowest-ranking permanent and temporary positions, and excluded non-Japanese male employees in the U.S. from decision-making authority. The labor relations practices of Japanese-owned subsidiaries and branches and those of other foreign-owned corporations are subject to close scrutiny by American courts, the public, and regulatory agencies when they clash with local culture, customs, and legal standards. U.S. courts have, to varying degrees, asserted their authority to require American-incorporated subsidiaries of foreign multinationals to change these employment practices when they violate American civil rights statutes, regulations, and policies.[13]

III. The History of the *Spiess*, *Porto*, and *Avagliano* Decisions

A. *Spiess v. C. Itoh & Co. (America)*

Three cases, *Spiess v. C. Itoh (America)*,[14] *Porto v. Canon (USA)*,[15] and *Avagliano*[16] have shaped the law to date. The *Spiess* litigation is important because it was one of the first Title VII class action suits alleging employment discrimination filed by American employees against a Japanese subsidiary in the United States. On February 21,

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[12] Gould, *supra* note 11.

[13] *See, e.g.*, Wickes v. Olympic Airways, 745 F.2d 363 (6th Cir. 1984); Mattison v. Canon, U.S.A., Inc., 28 Fair Empl. Prac. Cas. (BNA) 1685 (N.D. Ill. 1981); Porto v. Canon, U.S.A., Inc., 28 Fair Empl. Prac. Cas. (BNA) 1679 (N.D. Ill. 1981); Avigliano v. Sumitomo Shoji America, Inc., 473 F. Supp. 506 (S.D.N.Y. 1979), *aff'd*, 638 F.2d 552 (2nd Cir. 1981), *rev'd on other grounds*, 457 U.S. 176 (1982); Spiess v. C. Itoh & Co. (America), 469 F. Supp. 1 (S.D. Tex. 1979), *rev'd*, 643 F.2d 353 (5th Cir. 1981) *vacated*, 457 U.S. 1128 (1982); American Jewish Congress v. Carter, 19 Misc. 2d 205, 190 N.Y.S.2d 218 (Sup. Ct. 1959), *modified*, 10 A.D.2d 833, 199 N.Y.S.2d 157 (App. Div. 1960), *aff'd*, 9 N.Y.2d 223, 173 N.E.2d 788, 213 N.Y.S.2d 60 (1961).

[14] 469 F. Supp. 1 (S.D. Tex. 1979), *rev'd*, 643 F.2d 353 (5th Cir. 1981), *vacated*, 457 U.S. 1128 (1982).

[15] 28 Fair Empl. Prac. Cas. (BNA) 1679 (1981).

[16] 473 F. Supp. 506 (S.D.N.Y. 1979). The captioned plaintiff's name was misspelled in the lower court proceeding. The proper spelling is "Avagliano."

1975, three male Caucasian-American executives employed by the American subsidiary of C. Itoh (C. Itoh America) filed suit against their employer's Houston office alleging discrimination on the basis of national origin.[17] The plaintiffs claimed that although they performed middle managerial duties comparable to those of Japanese male non-secretarial employees, C. Itoh America subjected them to differential treatment with respect to compensation, terms, conditions, and privileges of employment, including opportunities for promotion to management. The plaintiffs also maintained that they out-performed their Japanese counterparts when negotiating and servicing contracts with American corporations and United States government agencies.[18]

The *Spiess* case turned on the interpretation of provisions of the 1953 U.S.–Japan FCN Treaty.[19] Article VIII(1) of the U.S.–Japan FCN Treaty gives nationals and companies of both nations the right "to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists *of their choice* . . . ."[20]

The issue of whether an American subsidiary of a Japanese corporation is a company of the United States or of Japan under the U.S.–Japan FCN Treaty is of particular importance. In *Spiess*, the U.S. District Court for the Southern District of Texas held that the U.S.–Japan FCN Treaty does not provide American subsidiaries of Japanese corporations with an absolute right to hire managerial, professional, and other specialized personnel without regard to American civil rights law.[21] The court held that the "of their choice"

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[17] *Id.* The action was brought under 42 U.S.C. § 1981 (1974) (formerly the Civil Rights Act of 1866) and Title VII, *supra* note 1.

[18] Spiess v. C. Itoh & Company (America), Civil Action 75-h-267 (S.D. Tex. Feb. 21, 1975).

[19] There are postwar period treaties of Friendship, Commerce and Navigation in effect between the United States and various countries which have similar provisions to those found in the U.S.–Japan FCN Treaty. These treaties are used to regulate day-to-day relationships between private parties in the two countries. They permit citizens and companies of either country to conduct business within the other country under a "national treatment" standard. Companies of either party may engage in enterprises on a reciprocal basis, and may organize using either branch or subsidiary corporate form. Japanese businesses in the U.S. thus have great latitude in what they may do and many protections under U.S. law. U.S.–Japan FCN Treaty, *supra* note 2, at art. VII, para. 1. *See* Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805 (1958); *see also* Note, *Title VII and the FCN Treaty: The Exemption of Japanese Branch Operations from Employment Discrimination Laws*, 7 B.C. INT'L & COMP. L. REV. 67, 67 (1984).

[20] U.S.–Japan FCN Treaty, *supra* note 2, at art. VIII (emphasis added).

[21] Spiess v. C. Itoh & Co. (America), 469 F. Supp. 1, 9 (S.D. Tex. 1979).

provisions of Article VIII(1) apply only to employees hired in Japan and that, therefore, local discriminatory hiring is prohibited.[22] The Fifth Circuit Court of Appeals reversed the lower court's decision and held that C. Itoh America could assert rights under the U.S.–Japan FCN Treaty.[23] The appeals court, however, limited the scope of the "of their choice" provisions to the hiring of Japanese personnel for managerial and technical positions.[24] In dissent, Judge Reavley cited Article XXII(3) of the U.S.–Japan FCN Treaty which provides that a corporation has the nationality of its place of incorporation.[25] Judge Reavley stated that because C. Itoh America was incorporated in the U.S., it was a company of the United States and thus was ineligible for the U.S.–Japan FCN Treaty's Article VIII(1) "of their choice" exemption.[26] Judge Reavley's dissent is in accord with the subsequent rulings of the U.S. District Court for the Northern District of Illinois in *Porto v. Canon, U.S.A., Inc.* and the U.S. Supreme Court in *Avagliano v. Sumitomo Shoji America, Inc.*

B. *Porto v. Canon, U.S.A., Inc.*

In the 1981 decision of *Porto v. Canon, U.S.A., Inc.*, a Caucasian plaintiff alleged that the defendant, Canon, U.S.A., had "a hiring promotional and employment system which [limited] the employment and promotional opportunities of non-Japanese national origin employees," and that, "had he been Japanese, he would not have been fired."[27] The court found that under settled principles of international law, if a defendant is incorporated under the laws of the United States, the defendant is an American company for U.S.–Japan FCN Treaty purposes.[28] The decision distinguished the rights of a wholly-owned subsidiary from the rights of a branch.[29] The court pointed out several legal advantages to subsidiary status, including tax and conflict of laws benefits to the parent.[30] The court suggested that by invoking the benefits of U.S. law, a corporation must "accept the burdens of U.S. law as well."[31] The court rejected

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[22] *Id.*
[23] Spiess v. C. Itoh & Co. (America), 643 F.2d 353 (5th Cir. 1981).
[24] *Id.* at 355.
[25] *Id.* at 363 (Reavley, J., dissenting).
[26] *Id.* at 363–72.
[27] 28 Fair Emp. Prac. Cas. (BNA) at 1679.
[28] *Id.* at 1681.
[29] *Id.* at 1682.
[30] *Id.*
[31] *Id.*

the defendant's argument that it was exempt from Title VII under the FCN Treaty because this reasoning carried to its logical extreme would also exempt the defendant from laws granting rights to labor unions and employees, and laws prohibiting child labor.[32]

The court concluded that, although the defendant was not exempt from Title VII, Title VII did not affect the defendant's ability to hire "Japanese nationals in positions where such employment is *reasonably necessary* to the successful operation of its business."[33] The court left open the questions of what reasonably necessary is, and how to assess this standard.

C. *Avagliano v. Sumitomo Shoji America, Inc.*

The Supreme Court decision in *Avagliano v. Sumitomo Shoji America* seemed to open the flood gates of litigation for Title VII discrimination cases filed by Americans employed by foreign-owned businesses in the United States.[34] Despite the final holding that wholly-owned subsidiaries of Japanese companies incorporated under U.S. laws are not exempt from Title VII, the decisions of the Supreme Court and the Court of Appeals for the Second Circuit suggest that some modified standard under Title VII might be available to Japanese companies doing business in the United States. Neither decision, however, gives any firm guidance to foreign companies.

Avagliano was originally filed in 1977 as a class action by eleven female plaintiffs, including ten American citizens and one Japanese citizen who were current and former secretarial employees of Sumitomo Shoji America, Inc. (Sumitomo America), a U.S.-incorporated subsidiary of a Japanese general trading company. The *Avagliano* plaintiffs alleged that the company restricted them to clerical jobs and did not train them for or promote them to executive, mana-

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[32] *Id.* at 1684.

[33] *Id.* (emphasis added).

[34] 457 U.S. 176 (1982). For a general discussion of discrimination cases filed by American employees of Japanese-owned companies, see N.Y. Times, Jan. 25, 1988, at A16, col. 1; Johnson, *Japanese-style Management in America*, 30 CALIF. MGMT. REV. 34, 35 (1988). *See also* Nathans, *A Matter of Control*, BUS. MONTH, Sept. 1988, at 46, 51. In a September 15, 1988 interview with Lewis Steel, of Steel, Bellman and Levine, New York, plaintiff's counsel in *Avagliano*, the author was advised that Steel's firm is completing class action discovery in Duffy v. C. Itoh, a suit filed against a Japanese trading company, and has filed two pattern and practice cases with the Equal Employment Opportunity Commission against Japanese-owned financial institutions, one a U.S.-incorporated subsidiary and the other a branch of a Japanese parent corporation.

gerial, or sales positions because Sumitomo America allegedly favored male Japanese citizens for these positions.[35] The plaintiffs charged discrimination on the basis of sex and national origin in violation of Title VII.

Title VII prohibits discrimination against any individual with respect to "compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ."[36] Title VII further prohibits an employer from limiting, segregating, or classifying employees in any way which "would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of . . . race, color, religion, sex, or national origin."[37]

The defendants in *Avagliano* asserted that the "of their choice" language in the U.S.–Japan FCN Treaty immunized them from these provisions of Title VII.[38] The district court, however, held that the purpose of the U.S.–Japan FCN Treaty was to "assure that Japanese companies operating in the United States, and vice versa, will not be discriminated against in favor of domestic corporations."[39] Relying on Article XXII(3) of the Treaty, which states that a company must be established under Japanese law to be considered a Japanese company for treaty purposes,[40] the district court held that Sumitomo America "is a domestic corporation and as such has neither standing nor need to invoke the aegis of the Treaty."[41] Thus, Sumitomo's American subsidiary could not claim immunity from United States law, including Title VII.

On appeal, the Second Circuit Court of Appeals held that Sumitomo America "was entitled to invoke the employment provisions of the Treaty, but that the Treaty does not exempt Japanese companies operating in the United States, . . . whether or not they are incorporated in the United States, from American laws prohib-

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[35] *Avigliano*, 473 F. Supp. at 508. The district court dismissed the plaintiffs' section 1981 claim, 42 U.S.C. § 1981, and stated that this claim was unnecessary because Title VII provided an adequate remedy. 473 F. Supp. at 514.

[36] Title VII, 42 U.S.C. § 2000e–2.

[37] *Id.*

[38] *Avigliano*, 473 F. Supp. at 511.

[39] *Id.* at 513.

[40] U.S.–Japan FCN Treaty, *supra* note 2, at art. XXII, para. 3: "Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof . . . ."

[41] *Avigliano*, 473 F. Supp. at 513.

iting discrimination in employment."[42] The court observed that Article XXII(3) of the U.S.–Japan FCN Treaty leaves open the question of whether a company is "sufficiently 'Japanese' to invoke the Treaty's substantive provisions."[43] The Court of Appeals referred to U.S. Department of State visa regulations applicable to the admission of treaty traders, providing that "[t]he employment must be . . . by an organization which is principally owned by a person or persons having the nationality of the treaty country."[44]

The Court of Appeals noted that the "purpose of the Treaty . . . was not to protect foreign investments made through branches, but rather to protect foreign investments generally."[45] The court also relied on visa rules for treaty traders which define corporate nationality as the "nationality of those persons who own the principal amount of the stock of that corporation [i.e., more than fifty percent], regardless of the place of incorporation."[46] Applying these tests, the Court of Appeals found that Sumitomo America was in fact a Japanese company entitled to invoke the substantive provisions of the U.S.–Japan FCN Treaty including Article VIII.[47] The court also held that the FCN Treaty did not exempt Sumitomo America from Title VII with respect to its executive personnel.[48]

The Supreme Court granted certiorari in *Avagliano* but limited its opinion to the issue of whether Article VIII(1) of the U.S.–Japan FCN Treaty provided a defense to the Title VII claims filed against Sumitomo America.[49] The Court held that Sumitomo America is "constituted under the applicable laws and regulations of New York" and is therefore, under Article XXII(3) of the U.S.–Japan

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[42] Avigliano v. Sumitomo Shoji America, Inc., 638 F.2d 552, 554 (2d Cir. 1981).

[43] *Id.* at 557.

[44] *Id.* at 557 n.4 (quoting 22 C.F.R. § 41.40(a) (1981)). A treaty trader, as defined in the Immigration and Nationality Act provision in effect at the time of the *Avagliano* litigation, is an alien from a country which is a party to a FCN Treaty between the United States and the country of which he or she is a national. The person is granted entry to the U.S. in order to carry on substantial trade between the country of nationality and the U.S. under an E-1 visa classification. Closely related to the E-1 visa is the E-2, or treaty investor visa. The holder is an alien from a treaty country who has invested or is in the process of investing money in the U.S. and who is entering the U.S. "solely to direct or develop his investment or essential employees of a treaty investor." These positions are defined according to E-1 visa qualifications, and are generally executive or managerial personnel. 8 U.S.C.§ 1101 (a)(15)(E)(i); 8 C.F.R. 214.2(e).

[45] *Avigliano*, 638 F.2d at 556.

[46] 9 FOREIGN AFFAIRS MANUAL Part II § 41.40 n.8.

[47] *Avigliano*, 638 F.2d at 557–58.

[48] *Id.* at 559.

[49] 457 U.S. 176 (1982).

FCN Treaty, a company of the United States rather than a company of Japan.[50]

Sumitomo America argued that the intent of the Treaty "was to cover subsidiaries regardless of their place of incorporation."[51] The Court concluded, however, in accord with *Spiess*, that the purpose of the Treaty was to allow corporations of each signatory "to conduct business in the other country on a comparable basis with domestic firms."[52] The postwar U.S.–Japan FCN Treaty was not intended to give foreign corporations greater rights than domestic companies, but "instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage."[53] By receiving "national treatment,"[54] local subsidiaries "are entitled to the rights, and *subject to the responsibilities* of other domestic corporations."[55]

The Court compared the rights of Japanese branches with those of locally incorporated subsidiaries of Japanese parent companies, and stated that, contrary to the Court of Appeals' interpretation in *Spiess*, U.S.-incorporated subsidiaries of foreign parents would enjoy a greater bundle of rights than those enjoyed by branches if they were found to be exempt from Title VII.[56]

In response to the concern expressed by the Court of Appeals that the rights of Japanese companies operating directly in the United States would be greatly superior to those of locally incorporated subsidiaries, the Supreme Court stated by negative inference that the branches would have more limited rights than the subsidiaries.[57] The branches have access to the legal system, are protected against unlawful entry and molestation, are able to obtain patents, engage in import and export activities, make payments, remittances and transfers of funds, and enjoy the advantages of employing nationals "of their choice" conferred by Article VIII(1).[58] The subsidiaries have "these rights and more" because they are

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[50] *Id.* at 182.

[51] *Id.* at 185.

[52] *Id.* at 186.

[53] *Id.* at 187–88.

[54] Art. XXII(1) of the FCN Treaty defines national treatment as "treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party." U.S.–Japan F.C.N. Treaty, *supra* note 2, at 2079.

[55] *Avagliano*, 457 U.S. at 188.

[56] *Id.* at 189.

[57] *Id.* at 188.

[58] *Id.* at 189.

companies of the United States.[59] The Supreme Court's statement indicates that "national treatment" is equivalent to "equal treatment," as well as equal responsibility, for foreign corporations doing business in the United States.[60]

IV. The Open Question: The Use of The Business Necessity Defense and Bona Fide Occupational Qualifications

The United States Supreme Court in *Avagliano* left open to subsequent court decisions the question of whether a business necessity defense or a special bona fide occupational qualification (BFOQ) exception might be available to Sumitomo America and other foreign-owned subsidiaries and branches.[61] The bona fide occupational qualification is an affirmative defense to Title VII's prohibition against sex, religion, and national origin discrimination. It is used when persons of only one sex, religion, or national origin can carry out a job and those characteristics are actual qualifications for carrying out the job. It is a narrowly construed exception used as a defense in the "disparate treatment" type case.[62] BFOQ exceptions have been narrowly applied in sex discrimination cases. Generally, the business necessity defense becomes available when the employer charged with discrimination requires all applicants to be able to perform a specific task. If a rejected female applicant claims sex discrimination because of a disparate impact on women, the employer may then raise a business necessity defense under which it must be shown that the ability to perform the task is in fact "reasonably necessary to performing the job."[63]

A foreign-owned subsidiary or branch may be able to argue that foreign language, high executive, managerial and supervisory responsibility, and knowledge of the parent company are required for dealings with intermediaries, customers, and the parent com-

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[59] *Id. See also Civil Rights Laws and United States Treaties: Stagnating in Judicial Limbo*, 5 Hous. J. Int'l L. 323, 337 (1983).

[60] *See Avagliano*, 457 U.S. at 187–88.

[61] *Id.* at 189 n.19.

[62] *See* Title VII, 42 U.S.C. § 703(e). In contrast, the business necessity affirmative defense is used when a facially neutral employment practice, applied equally to all employees or applicants, has an "adverse impact" on a group of "protected class" members, *e.g.*, on the basis of race, color, religion, sex, or national origin. If adverse impact is established, the burden is on the defendant employer to justify the practice based on business needs.

[63] B. Schlei & P. Grossman, Employment Discrimination Law (Supp. 1979). *See also* Note, *Discriminatory Hiring Practices by Foreign Corporations in the United States—A Limited Right*, 5 Fordham Int'l L.J. 509 (1981–82).

pany. The subsidiary or branch may be able to preserve a certain percentage of high level positions for those qualified on the basis of these skills. Nevertheless, based on the narrow BFOQ for sex, it may be difficult to argue that male gender is a "reasonably necessary" attribute of executive, managerial, or sales personnel when customer preference is removed and female employees work with the American market. For example, the record in *Avagliano* indicates that Sumitomo America did not employ females as officials and managers, professionals, or sales workers.[64]

It may be possible for a foreign-owned subsidiary or branch to prove that certain foreign employees are essential to profitable business in the United States.[65] The business necessity defense does not accommodate sex-related preferences except with respect to an individual "ability to perform" standard. Ability to perform in the American marketplace might be difficult to prove with respect to American female plaintiffs. Ability to perform would be virtually impossible to prove for Japanese female employees given the ability of Japanese women to communicate both in the American marketplace and with the home office in Japan. A job analysis[66] would identify the extent to which managerial and sales personnel deal with the home office and the U.S. marketplace. Such an analysis would enable courts to determine which employment skills are essential for purposes of evaluating the business necessity defense.

Over the past several years there have been significant changes in U.S. Supreme Court interpretations of respective burdens of a Title VII plaintiff and a defendant employer. In a 1988 case, *Watson v. Fort Worth Bank & Trust*, the burden of proof on the plaintiff was

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[64] Brief for Respondents and Cross-Petitioners at 3, Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982). Sumitomo's EEO-1 reports for 1976 indicated that it listed 31 of 219 persons employed as "officials and managers." Twenty-eight of these 31 positions were filled by "Orientals," none by other minority groups, and three by Caucasians. All officials and managers were male. Of the 35 "professionals," 25 were "Orientals," the rest were white males. No women were employed as professionals. Of 43 persons employed as sales workers, 37 were "Oriental" males, six were white males. No women were employed as sales workers. Sumitomo employed women only in the "technician" and "office and clerical" categories. For full statistics, see Note, *Japanese Employers and Title VII: Sumitomo Shoji America, Inc. v. Avagliano*, 15 N.Y.U. J. INT'L L. & POL. 653, 658–59 (1983).

[65] "The challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be no acceptable alternative policies or practices which would better accomplish the business purposes advanced . . . ." Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 370 (4th Cir. 1980) (quoting Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971)).

[66] *See infra* note 143 and accompanying text.

moderate.[67] The Court held in *Watson* that the employee had the burden of "isolating and identifying the specific employment practices that are allegedly responsible for any observed disparities."[68] But, in a 1989 decision, *Ward's Cove Packing Co. v. Atonio*, the Court held that, once an employee has proven the existence of a neutral policy or practice with adverse impact on a protected class, the burden does not shift to the employer to prove business necessity.[69] Instead, the Court stated that the burden upon the employer is merely to articulate *significant* business reasons for its actions.[70] The burden of proof remains on the plaintiff to show that the reasons are discriminatory and a pretext for discrimination, or that there is no substantial justification for the employer's policy or procedure.[71] Mere reliance on statistical proof is insufficient.[72] Rather, the employee must demonstrate that a specific employment practice has caused the disparate impact.[73] Thus, the burden to be met by the employee has become greater.

Under the *Ward's Cove* analysis, the need for knowledge of Japanese language, culture, and customs might rise to the standard of a significant business reason for a Japanese-owned subsidiary to include Japanese nationals at the higher levels of its U.S. operation. Rather than demonstrating a direct relationship to each job performed, as would be established through a task analysis of each job, it might suffice for an employer to show that it deals not only with the U.S. market but also with the Japanese home office, and that this constitutes a significant business reason, if not an absolute necessity. Alternatively, as will be seen below in the discussion of the *MacNamara* case, an argument may be made that use of home country nationals to control a parent corporation's investment in the United States might also be a significant business reason for employing home country nationals familiar with the parent corporation's business objectives in the United States market.

The *Avagliano* decision also left open whether uniqueness could create a new type of BFOQ for subsidiaries of foreign-owned mul-

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[67] 108 S. Ct. 2777 (1988).

[68] *Id.* at 2788.

[69] 109 S. Ct. 2115 (1989).

[70] *Id.* at 2125–26.

[71] *Id.* at 2126.

[72] *Id.* at 2121.

[73] *See* P. Berkowitz, Discrimination under United States Laws and Its Impact on Multinational Corporations, paper presented at the American Bar Association Committee on International Employment Law Annual Meeting 9–10 (Aug. 6, 1989) (unpublished paper).

tinationals. Courts must examine whether a Japanese multinational corporation has unique needs requiring it to employ "Japan[ese] staff even at the lowest level of its management echelons."[74] According to the *Benchmark Survey* of the Department of Commerce, "foreign citizens employed in U.S. affiliates of foreign multinationals in 1974 represented 6.3 percent of all production workers and 11.8 percent of nonproduction workers."[75] Japanese nationals, however, were employed at the higher rate of 33.1 percent for production workers and 39.4 percent for non-production workers.[76] The *Benchmark* statistics have not been updated, however, other data suggests a decline in these figures for certain industries.[77] A 1978 study of the impact of the Japanese business community in New York noted that in the case of trading companies, there was a ratio of one Japanese employee for every 1.5 American employees.[78] More current data on general trading companies is not available. These statistics and several studies of Japanese multinational corporations which refer to the characteristically high level of staffing by Japanese nationals in Japanese overseas operations should be

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[74] Sethi and Swanson, *Are Foreign Multinationals Violating U.S. Civil Rights Laws?*, 4 EMPLOYEE REL. L.J. 485, 501 (1979).

[75] *Id.* (emphasis in original). *See also* Brief for the Japan External Trade Organization as Amicus Curiae at 9, Sumitomo Shoji America v. Avagliano, 457 U.S. 176 (1982) (Nos. 80-2070, 81-24).

[76] Sethi and Swanson, *supra* note 74, at 501.

[77] As reported in 1988, of the 25 largest Japanese-owned subsidiaries in the U.S., the majority employed between one and five percent Japanese employees. Industries surveyed included banking, motor sales, and electronics. Nathan, *supra* note 4. Also, according to a survey by the Japan External Trade Research Organization, from 1987 to 1989 Japanese-owned manufacturing companies in the U.S. employed approximately 3.5 percent Japanese employees. Unpublished Survey (on file with author).

[78] *Id.* at 501 (citing JAPAN SOCIETY, INC., THE ECONOMIC IMPACT OF THE JAPANESE BUSINESS COMMUNITY IN NEW YORK 18–19 (1978)). *See also* Brief for the Japan External Trade Organization as Amicus Curiae, *supra* note 75, at 9. The ratio of Americans to Japanese directly employed by Japanese-owned firms varies considerably from industry to industry. In manufacturing firms, the number of American employees at both the blue collar and the executive levels is very high compared to the number of Japanese, a ratio of 28 to 1. In the case of general trading companies (sogo shosha) the ratio is lower. The reason for this discrepancy is not only that local blue collar workers generally are not needed in such organizations, but also that local nationals do not have the special training and knowledge required for managerial and other key positions. Executives qualifying for these positions must understand sophisticated questions of international trade, finance, transportation, and investment. They must know the Japanese market, customers, goods, culture, and language, and they must be familiar with the company's headquarters and with the worldwide organization. *Id.*; *See also* Wilson and Adkins, *How the Japanese Run U.S. Subsidiaries*, DUN'S BUS. MONTH, Oct. 1983, at 32; Trucco, *In Japan, Problems of Working Women*, N.Y. Times, June 19, 1983, at A49, col. 2.

analyzed by U.S. courts in connection with actual tasks performed by Japanese nationals in the American subsidiaries.[79]

The *Avagliano* and subsequent decisions have fallen short of giving guidance to foreign-owned subsidiaries concerning the extent to which foreign practices may be continued in United States business operations, and up to what level in the organization the employment of foreign citizens would be allowed without a violation of Title VII. On the one hand, the Second Circuit Court of Appeals in *Avagliano* conceded that there might be a uniqueness of Japanese general trading companies which requires knowledge of Japanese language, culture, and custom to accommodate both the home country headquarters and interaction with Japanese clients and suppliers in the U.S. and abroad.[80] On the other hand, other U.S. courts have rejected the accommodation of mere customer preference.[81] The uniqueness defense must be based on what the duties of the job dictate. As indicated by the *Spiess* plaintiffs, who interacted within the American market, the bulk of their work involved American suppliers, and they were more effective in trading in the U.S. market than the Japanese "rotating staff."[82] Such circumstances, where present, would presumably counter a uniqueness defense.

V. Unavailable Defenses

A. *Citizenship Preference*

Sumitomo America argued in its brief to the U.S. Supreme Court in the *Avagliano* matter that its preferential employment of Japanese male nationals was not an "unlawful employment practice"

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[79] *See* A. Young, The Sogo Shosha: Japan's Multinational Trading Companies 230 (1979); T. Ozawa, Multinationalism, Japanese Style 212–13 (1979); Sethi and Swanson, *supra* note 74, at 502:

> Studies by Yoshi Tsurumi of Japanese overseas operations in Asia showed that Japanese affiliates would have three to four times as many managers and engineers of home country origin than do comparable American or European enterprises. Compared with their occidental counterparts, expatriates in Japanese affiliates were placed very low in the organizational hierarchy. Furthermore, while American and European companies hired expatriates with nationalities different from their own, Japanese affiliates brought in Japanese staff exclusively from the employee rolls of the parent company in Japan.

See also Y. Tsurumi, The Japanese are Coming: A Multinational Interaction of Firms and Politics 243–74 (1976).

[80] *Avigliano*, 638 F.2d at 559.

[81] *See infra* note 143 and accompanying text.

[82] *Spiess*, 459 F.2d at 4.

under Title VII because Title VII does not control employment practices based on nationality.[83] Sumitomo America cited *Espinoza v. Farah Manufacturing Co.* for the proposition that "nothing [in Title VII] makes it illegal to discriminate on the basis of citizenship or alienage."[84] Sumitomo America also relied on other cases which distinguish "national origin," the words used in Title VII, from "citizenship."[85] The *Sumitomo* brief stated that nationality preference is actually induced by U.S. visa regulations, "since only Japanese nationals can acquire treaty trader status for employment in Japanese owned firms."[86] This argument overlooks the fact that American citizens and permanent residents of the United States do not require visas to work in firms doing business in the United States. Sumitomo's argument stems from a unique view of Japanese multinational corporations that overseas subsidiaries are not autonomous, locally staffed profit centers, but rather extensions of the parent company's operations and staff.

While the Supreme Court did not address Sumitomo America's citizenship arguments, a citizenship BFOQ may be attempted by another employer at some later date.[87] Sumitomo America's arguments did not take into account the view that, by using local incorporation to enjoy certain benefits,[88] Sumitomo America had become

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[83] Brief for Petitioner and Cross-Respondent, *supra* note 64, at 14–18.

[84] 414 U.S. 86, 95 (1973). *See also* Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers*, 31 STAN. L. REV. 947, 958 (1979).

[85] Brief for Petitioner and Cross-Respondent, *supra* note 64, at 16–17. The brief notes that:

> Congress itself has passed laws discriminating against aliens, *see, e.g.*, 31 U.S.C. § 699b (1988). Although in Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), the Court struck down practices of various government agencies barring aliens from government employment, it recognized that such practices could be mandated by express congressional or presidential action. Thereafter the President did prohibit employment of aliens in federal government positions. Exec. Order No. 11935, 41 Fed. Reg. 37,301 (1976) (codified at 5 C.F.R. § 7.4). In contrast, other Executive Orders prohibit national origin discrimination in employment (citations omitted). The EEOC has also recognized that discrimination on the basis of citizenship, without more, is not national origin discrimination under Title VII (citations omitted).

[86] Brief for Petitioner and Cross-Respondent, *supra* note 64, at 17. This view is based more on restrictive Japanese immigration policies than on availability of non-Japanese employees.

[87] Avagliano, 457 U.S. at 189 n.19.

[88] *Recent Developments*, 15 TEX. INT'L L.J. 187, 196–99 (1980): "Benefits to the locally incorporated subsidiary include . . . 1) the satisfaction of claims arising from the activities of such subsidiaries is limited to the assets of the subsidiary; 2) preferred tax treatment; 3) customer relations advantages."

a company of the United States and therefore could not view Americans as aliens in their own country.[89]

Even if Sumitomo America had been found to be a foreign corporation insulated from domestic law due to the FCN Treaty, several issues would have remain unresolved. First, courts must address the issue of treating American citizens within U.S. territory as outside the protection of domestic civil rights law.[90] Second, the Immigration and Naturalization Service as well as the courts must review the availability of qualified Americans for certain positions being filled by non-resident aliens holding treaty trader visas.[91] Finally, courts must consider the tendency of some multinationals in the United States and elsewhere to avoid selecting local nationals for higher positions in their overseas subsidiaries.[92] A study might be done to determine whether the latter tendency presents more of a problem for certain types of companies and industries, such as Japanese general trading companies, than for manufacturing, high technology, and financial services firms, which tend to employ American workers and executives up to a fairly high executive level.[93] Legislative bodies, regulating agencies, and the courts will need to examine the exact activities of foreign-owned companies to determine whether they require extensive staffing with home country nationals to carry on business activities in the United States.

The *Avagliano* Court expressed no view "as to whether Japanese citizenship may be a bona fide occupational qualification for certain positions at Sumitomo or as to whether a business necessity defense may be available."[94] The Court added, however, that "there can be little doubt that some positions in a Japanese-controlled company doing business in the United States call for great familiarity with

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[89] Lewin, *Sex Bias or Clash of Cultures?*, N.Y. Times, Apr. 8, 1982, at D1, col. 3.

[90] *See* Nothstein and Ayres, *supra* note 11, at 26–34.

[91] *See, e.g.*, Sethi and Swanson, *supra* note 74, at 459–97. *See also* Brief for the United States as Amicus Curiae, Appendix A at 8, Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 126 (1982) (quoting U.S. State Department Instructions of July 10, 1981 to Diplomatic and Consular Posts Regarding Treaty Trader Visas). "E-1 status is intended only for the entry of specialist employees truly essential to the firm's operations in the U.S., and not as a channel for the importation of ordinary skilled workers no matter how desirable this might be from the firm's viewpoint. Secondly, a common theme in such cases is the question, 'What is it that the foreign worker can do under the circumstances that an American worker cannot do or cannot be trained to do?'"

[92] *See generally* A. YOUNG, *supra* note 79.

[93] Wilson and Adkins, *supra* note 78, at 32; *see also* Herron and Wright, *General Toyota Makes a Deal*, N.Y. Times, Sept. 25, 1983, at D2, col. 2; Serrin, *Japanese Turn Arkansas Plant into a Success*, N.Y. Times, Nov. 3, 1983, at A1, col. 2.

[94] 457 U.S. at 189 n.19.

not only the language of Japan, but also the culture, customs, and business practices of that country."[95] The Court went no further in its discussion, limiting its decision solely to the question of exemption from domestic Equal Employment Opportunity (EEO) law under the U.S.–Japan FCN Treaty.[96]

B. *Customer Preference*

In its discussion of BFOQs in *Avagliano*, the Second Circuit Court of Appeals suggested that courts might consider the factor of "acceptability to those persons with whom the company or branch does business."[97] This factor was specifically rejected in *Fernandez v. Wynn Oil Co.*, a Ninth Circuit Court of Appeals sex discrimination ruling.[98] The U.S. District Court for the Central District of California found male sex to be a BFOQ for the job of Director of International Marketing in the defendant company. A woman had applied for the jobs of Director of International Marketing and National Sales Manager. The lower court forbade discrimination on the basis of sex unless:

> [S]election of one sex exclusively is *necessary* for the safe and efficient conduct of business so that a company's very business function would be undermined were it to hire both sexes for a position. And 'business necessity' means just that: necessity. Customer preferences should not be bootstrapped to the level of business necessity. The only occasion where customer preference will rise to the level of a bfoq is where no customer will do business with a member of one sex either because it would destroy the essence of the business or would create serious safety and efficiency problems. Merely because customers would prefer one sex over another on a convenience level does not make the hiring of one sex, exclusively, 'necessary' within the meaning of 42 U.S.C. § 2000e–2(e).[99]

Despite this clear language, the court held that sending the female plaintiff to Latin America or Southeast Asia would have "totally subverted" any business the defendant employer hoped to do in those regions.[100] Both the district court and the Ninth Circuit Court

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[95] *Id.*

[96] *Id.*

[97] *Avigliano*, 638 F.2d at 559.

[98] 653 F.2d 1273 (9th Cir. 1981), *aff'g* 20 Fair Empl. Prac. Cas. (BNA) 1162 (C.D.Cal. 1979).

[99] *Fernandez*, 20 Fair Empl. Prac. Cas. (BNA) at 1165.

[100] *Id.*

of Appeals, furthermore, found the plaintiff to be less qualified than the male applicants who were selected based on education and prior experience.[101]

The court of appeals, however, overruled the district court's decision that male gender was a BFOQ for the job of Director of International Marketing.[102] The court found no proof that the position required the holder to do business from a hotel room, which would have been unacceptable in Latin America, nor did the record demonstrate a basis for the district court's findings.[103] The appeals court held that "customer preference based on sexual stereotype cannot justify discriminatory conduct"[104] even if preference prevents customers from dealing with the employer and even if the customers are in other countries. The court held: "Though the United States cannot impose standards of nondiscriminatory conduct on other nations through its legal system, the district court's rule would allow other nations to dictate discrimination in this country. No foreign nation can compel the non-enforcement of Title VII here."[105] The court also upheld the Equal Employment Opportunity Commission's view that "the need to accommodate racially discriminatory policies cannot be the basis of a valid BFOQ exception."[106] The Second Circuit Court of Appeals' more expansive language in *Avagliano* concerning customer preference and Japanese subsidiaries will have to be reconciled with *Fernandez* and other cases involving the accommodation of customer preferences.[107]

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[101] *Id.*

[102] Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276 (9th Cir. 1981).

[103] *Id.*

[104] *Id.* at 1277.

[105] *Id.*

[106] *Id.* at 1273. The court stated:

> [S]tereotypic impressions of male and female roles do not qualify gender as a BFOQ. Nor does stereotyped customer preference justify a sexually discriminatory practice . . . . Furthermore, the Equal Employment Opportunity Commission has held that the need to accommodate racially discriminatory policies of other nations cannot be the basis of a valid BFOQ exception.

Id. at 1276–77. *See also* Note, *The Biases of Customers in a Host Country as a Bona Fide Occupational Qualification: Fernandez v. Wynn Oil Co.*, 57 S. CAL. L. REV. 335 (1984); *1981–82 Annual Survey of Labor-Relations and Employment Discrimination Law*, 24 B.C.L. REV. 256–66 (1982); Note, *Employment Discrimination—U.S. Employers in Foreign Countries: Is Customer Preference a Bona Fide Occupational Qualification?*, 31 U. KAN. L. REV. 183 (1982).

[107] *See also* Abrams v. Baylor College of Medicine, 581 F. Supp. 1570 (S.D. Tex. 1984), *aff'd in relevant part*, 805 F.2d 528 (5th Cir. 1986). *See* Berkowitz, *supra* note 73, at 22; Case Note, *Equal Employment Opportunity for United States Citizens Seeking Jobs Abroad: Abrams v. Baylor College of Medicine*, 19 U.S.F. L. REV. 75 (1984).

VI. The Conflict Between Japanese Subsidiaries' Staffing Patterns and the U.S. Immigration and Naturalization Service Visa Requirements

The liberalized BFOQ standard proposed by the Second Circuit in *Avagliano* is in conflict with the more stringent Immigration and Naturalization Service (INS) regulations for foreign treaty traders and investors. A New York immigration lawyer with a substantial Japanese and Korean clientele provides the following insight:

> A point of fascination for the author is that the standards for employee qualifications under E regulations promulgated by the Department of State are in conflict with the Treaty of Friendship, Commerce and Navigation now in effect between Korea and the United States, and such regulations have never been challenged. A strong possibility exists that the intent of the Treaty in this regard may have been completely ignored in the E visa regulations implementing the Treaty laws. The Treaty clearly states that it is the Treaty organization that may employ persons " . . . of *their* choice." The regulations, on the other hand, apparently have established clear cut categories for employee qualifications—executive, managerial, or persons with essential skills—contrary to the Treaty. While a proper interpretation of the Treaty with regard to employee qualification may not include minor and low level employees such as busboys, truck drivers, or deck hands, a serious question arises as to whether or not the Department of State regulations can set such standards and place the burden of proof on Treaty aliens to comply with the standards.
>
> Perhaps the proper interpretation of the language of the Treaty entitles the qualified Treaty alien to bring in any employee, placing the burden of proof on the U.S. government to sustain the claim that certain of these employees do not reasonably qualify.[108]

Applicants for treaty trader visas are rejected when there is no proof that the applicant will perform duties of a supervisory or executive nature; and no "special qualifications" have been proven solely by reason of the applicant's knowledge of the Japanese language.[109] Applicants for treaty investor visas must be employed in

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[108] C.S. Horn, A Practical Guide for Effective Use of Visas for Korean Businesses 5 (privately published) (copy on file with author). The Korean FCN Treaty is substantially similar to the U.S.–Japan FCN "of their choice" provisions at issue in *Avagliano*; *see* note 44 *supra* for explanation of visa types.

[109] Matter of Konishi, I and N Dec. 815 (1966), held that in an application for change of visa classification from visitor to treaty trader based on a position as executive assistant to the assistant vice president of a Japanese-owned import-export business, designation as

a similar capacity. In *Matter of Udagawa*, the INS stated: "Congress did not intend that skilled alien laborers or aliens occupying *minor managerial posts* should be eligible for treaty investor status. These job positions could be readily held by American workers without placing in jeopardy a United States investment made by a foreign firm."[110] When a waiver is provided for a specialist holding a minor managerial post, the individual must be "truly essential" to the firm's U.S. operations and the appropriate inquiry is: "what is it that the foreign worker can do under the circumstances that an American worker cannot be trained to do?"[111]

The male Caucasian plaintiffs in *Spiess* alleged that "except for participation in the management of defendant (Itoh), from which they ha[d] been unlawfully excluded, they perform[ed] the same type and quality of work as do certain of Itoh's nonsecretarial

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"executive assistant" rather than "secretary" does not establish that employment is to be other than in a minor "capacity"; *see also* Brief of Amicus Curiae for the United States, *supra* note 91, at Appendix A (quotingU.S. State Department Instructions of July 10, 1981 to Diplomatic and Consular Posts Regarding Treaty Trader Visas, 2a–8a). The Department reiterated standards dating back to the 1950's, noting that key issues are the nature of an "executive/supervisory" position; the "specific qualifications" that make a given applicant's skills "essential" to a foreign firm's U.S. operations; and what activities constitute substantial trade. There are no bright line tests for easily determining whether a given applicant is destined to an executive or supervisory position and therefore entitled to an E-1 visa. In assessing an executive/supervisory position raised by an individual case, factors which may be weighed include the title of the position, the location of the job in the firm's organizational structure, the duties involved, the degree to which the applicant will have ultimate control and responsibility for the firm's overall operations, the number and skill levels of the employees within his responsibility, and whether he presently possesses executive or supervisory experience which would reasonably qualify him for the proposed assignment. Pay is another factor that may be considered. Once all the information is gathered the test to be applied is essentially one of whether the executive/supervisory component of the described position is an "incidental/collateral" function inherent in the job's very nature. If the position chiefly involves routine work and only secondarily entails supervision of several low level employees, then the position in all probability would not be termed "executive/supervisory" in character. Weight should be accorded to each factor according to the circumstances of the particular case, e.g., vice president in a two-man banking office is not considered supervisory while it would be for an applicant to a large banking corporation with numerous employees. There are no clear tests for easily judging whether an alien possesses "specific qualifications" that are "essential" to a treaty trader firm's operations. E-1 status is intended only for the entity of specialist employees truly essential to the firm's operations in the U.S., and not as a channel for the importation of ordinary skilled workers no matter how desirable this might be from the firm's viewpoint. A critical question is, what is it that the foreign worker can do under the circumstances that an American worker cannot do or be trained to do? *Id.*

[110] 14 I and N Dec. 578, 581 (1974). *See also* Matter of Kobayashi and Doi, 10 I and N Dec. 425 (1963) (employees charged with the training or instruction and supervision of entertainers and waiters in a theatre restaurant were not held to be employed in a "reasonable capacity").

[111] *See infra* note 109.

employees who are of Japanese national origin"[112] and outperform their Japanese counterparts when servicing contracts with American corporations and U.S. government agencies. These plaintiffs alleged that the company "evaluat[ed] its employees on the basis of characteristics attributed to national origin rather than on the basis of individual capacities and refus[ed] to train its non-Japanese employees for management-level positions."[113] The American and Japanese female plaintiffs in *Avagliano* similarly alleged that they had "been restricted to clerical jobs and not trained for or promoted to executive, managerial or sales positions for which Sumitomo favor[ed] male citizens of Japan."[114] The testimony of Sadao Nishitomi, EEO Coordinator for C. Itoh America indicated that "[t]raining courses for Americans to develop [business skills] are not available and Americans are not transferred to Japan with the parent company for experience."[115] These practices conflict with the INS guidance on essential skills which require that the corporation applying for a visa for one of its home country employees must prove that the applicant possesses essential skills that the American worker cannot do or *be trained to do*.[116] The Second Circuit and Supreme Court dicta in *Avagliano* concerning skills necessary to work in Japanese-owned U.S. subsidiaries did not take into account the option of training American workers for some of the jobs at issue. Since the *Avagliano* decision, many Japanese-owned subsidiaries have begun to send American employees to Japan for one or more years for training or to become acquainted with the corporate culture of the parent corporation. Others, such as Sumitomo Corporation of America under its consent decree, are conducting in-house upward mobility training for their American employees in the U.S. offices.

VII. The Aftermath of *Avagliano:* The Consent Decree

Following *Spiess* and *Avagliano*, the community of foreign direct investors in the U.S. awaited an explicit standard for local hiring. Initially, it appeared that the *Avagliano* holding meant that Japanese-owned subsidiaries were bound to the same Title VII standard as

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[112] Sethi and Swanson, *supra* note 74, at 490.
[113] *Id.* at 492.
[114] *Avigliano*, 473 F. Supp. at 508.
[115] Sethi and Swanson, *supra* note 74, at 496.
[116] *See supra* note 109.

American companies;[117] upon a closer reading, however, the holding was narrower, stating only that the U.S. subsidiaries could not invoke "of their choice" provisions of the FCN Treaty[118] down to the lower levels of the organizational structure, but could hire executives and other specialists from their own country.

A. *The Consent Decree*

On remand, *Avagliano* was consolidated with *Palma Incherchera v. Sumitomo Corporation of America*,[119] and certified as a nationwide class action on November 7, 1984.[120] On March 30, 1987, the district court issued a consent decree in full settlement of the civil actions in both the *Avagliano* and *Incherchera* suits. The decree resolved the claims of class members with respect to current and future employment practices of Sumitomo Corporation of America (SCOA)[121] and provided for a dispute resolution system for claims which might arise during the term that the decree is in effect.[122] The decree was applicable to all SCOA personnel and positions, except for the positions of chairman, president, executive vice president, and general manager and was to remain in effect for three years.[123]

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[117] *Japanese-owned firms subject to job bias laws*, 4 Investment U.S.A. (BNA) 7–8 (July 1982).

[118] *Sumitomo decision leaves questions unresolved*, 4 Investment U.S.A. (BNA) 12–14 (July 1982).

[119] Consent Decree in Full Settlement of Civil Actions, 77 Civ. 5641 and 82 Civ. 4930 (S.D.N.Y.) [hereinafter Consent Decree]. The *Incherchera* case, filed in 1982, involved the class of complainants who attempted to join the *Avagliano* class at a later date. They were unable to intervene because the original case was still in the district court, but ultimately both class actions were consolidated and granted the same relief. Telephone interview with Lewis Steel, Steel, Bellman and Levine, New York City (Sept. 30, 1988).

[120] Avagliano v. Sumitomo Shoji America, Inc., 77 Civ. 5641 (CHT); and Palma Incherchera v. Sumitomo Corp. of America [hereinafter SCOA], 82 Civ. 4930, (CHT); 103 F.R.D. 562, 584 (S.D.N.Y. 1984). The former suit included females employed by SCOA from December 24, 1975, until the termination of the action; the latter included those employed from February 12, 1982.

[121] Sumitomo Shoji America, Inc. changed its name to Sumitomo Corporation of America [SCOA] during the course of this litigation. The decree provides retrospective wage adjustments of a minimum of $1500 for female employees who had completed two years of service by January 1, 1987 and who would not receive other benefits under the decree. Promotion awards of a minimum of $1500, concurrent with each female class member's first promotion were also to be provided. If members of either class could not be located, unspent funds were not to revert to SCOA. Retroactive to January 1, 1987 and prospective to 1987, 1988, 1989, base wage adjustments were ordered. In addition, in each year of the decree supplemental wage adjustments were to be made to female employees who were promoted, transferred, or placed in designated jobs set forth in the decree.

[122] Consent Decree, *supra* note 119, at 10.

[123] These positions are filled by a rotating staff of executives sent from the parent company in Japan for a limited term of service in the U.S. *Id.* at 11. The consent decree also

SCOA agreed to assign work based on qualifications, and legitimate business needs, and consistent with the decree. Female local staff employees were to be assigned to a broad range of tasks, including some formerly performed by rotating staff from Japan. The job title and compensation systems were to be redesigned to reflect new tasks assumed. Jobs were to be formulated in a manner that would create further opportunities for the female local staff consistent with the business needs of SCOA and to carry out the decree's objectives. SCOA agreed to review its rotating staff plans to ensure efforts to create additional management and sales jobs for female employees.[124]

Goals, rather than quotas, based on the number of all exempt[125] SCOA local and rotating staff were to be used to calculate an ultimate placement goal of female employees of twenty-three to twenty-five percent of total staff in all job titles. This goal was based on a nationwide and office-by-office objective.[126] The objective, by employment category for female employees was: five percent for senior management; thirty percent for management; seven percent for senior sales; and fifty-eight percent for sales.[127]

If SCOA failed to attain a goal it would not be in violation of the decree if it engaged in good faith efforts to attain that goal.[128] SCOA was not required to place any unqualified employee in a senior position, however class counsel reserved the right to challenge any placement decision if attainment of a goal for a particular

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covers SCOA's hiring of independent contractors. SCOA is to survey its own work force for qualified and interested female employees before engaging outside contractors in a nondiscriminatory manner. This provision was inserted in order to prohibit the use of independent contractors that would "divert employment opportunities" from its own female employees. *Id.* at 15.

[124] *Id.* at 25–26.

[125] Exempt staff are employees not subject to wage and overtime provisions of the Fair Labor Standards Act, *e.g.*, executives and sales staff. J.M. ROSENBERG, DICTIONARY OF BUSINESS AND MANAGEMENT 193 (2nd ed. 1983).

[126] Consent Decree, *supra* note 119, at 26–27.

[127] *Id.* at 28. In defining the specified job groups, the decree reads:

> the senior management job group includes product managers, directors, and vice presidents; the management job group includes business development analysts, research analysts, executive assistants, legal counsel, supervisors and managers; the senior sales job group includes account managers and sales managers; the sales job group includes sales and customer service representatives, customer service representatives, sales representatives and traders.

Id. at 28 n.16.

[128] *Id.* at 29.

job group is imperiled.[129] As a result of the consent decree, a consulting firm was retained to implement a system of job titling and compensation. The consulting firm conducted a task analysis[130] and developed job descriptions of the duties of incumbent employees.[131] Various programs were to be developed by SCOA to accomplish the goals of the decree, but none were to guarantee general or individual advancement or promotion for female employees.[132] The decree called for timely internal EEO dispute resolution, with no retaliation against those using the process.[133]

Class counsel was provided the right to monitor the decree periodically.[134] To facilitate this process, records maintained in the normal course of business in Japanese by SCOA and relevant to the specific monitoring effort by class counsel were to be translated through cooperation between the parties.[135] Although the consent decree itself and documents in the public record of the proceedings were not affected by various prohibitions against disclosure invoked by the parties, various documents, for example, those containing confidential, proprietary, trade secret information or personnel records which would result in an unwarranted invasion of privacy were to be kept in confidence. Records kept under orders of confidentiality, issued twice during the proceedings, were to be held in the same manner. Class members were also required not to reveal any confidences received in connection with the negotiation or implementation of the decree during the life of the decree.[136] The details of the consent decree have been presented for the reader to better

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[129] *Id.* at 29–30.

[130] For a discussion of the techniques of task analysis in Equal Employment Opportunity cases, see note 143 *infra* and accompanying text.

[131] Consent Decree, *supra* note 119, at 30.

[132] *Id.* at 32. The programs included a tuition refund program for female employees to enhance career-related work skills, on-the-job training to develop skills and abilities necessary for higher levels of responsibility, career counseling, a skills inventory program valuable to all female employees to determine their career development interests and potential for promotion, performance appraisal procedures, seminars on management and sales techniques conducted by SCOA management or its designees emphasizing SCOA policies and procedures, EEO training for SCOA officers and supervisors concerning nondiscriminatory treatment of female employees, and senior management workshops on EEO issues.

[133] *Id.* at 40–41.

[134] *Id.* at 43. Class counsel was awarded fees, costs, and disbursements for legal work done through the effective date of the decree for investigating claims brought by class members concerning compliance with the decree and for monitoring the decree.

[135] *Id.* at 44.

[136] *Id.* at 49.

understand certain common features of settlements with Japanese defendants, whether in a trade secret computer arbitration or an employment discrimination suit.[137] Confidentiality is often paramount to any sort of settlement.

The consent decree is far-reaching in scope and cost an estimated $2,355,200 plus salary adjustments, training and consulting costs, and plaintiffs' attorney fees. It is premature, however, to assess its permanent effects on the hiring and promotion practices of SCOA. The cost may appear great; however, Japanese general trading companies such as the parent of SCOA are among the largest corporations in the world, and such costs are but a small percentage of their profits.

The important questions to be answered in the near future are: to what extent the consent decree requirements have become permanent features of SCOA's U.S. practices, and to what extent other foreign-owned U.S. subsidiaries and branches have emulated SCOA and adopted employment practices that are not in conflict with U.S. legal requirements and EEO practices. There have certainly been preliminary steps to ensure compliance among Japanese securities subsidiaries and Japanese-owned banks and insurance companies. There is still, however, much to be done. A 1989 brief in the *Labor Letter* column of the *Wall Street Journal* indicated that fifty-seven percent of 331 Japanese companies operating in the U.S. face possible employee lawsuits for discrimination on the basis of race, color, religion, age, sex, and other equal employment issues.[138] This information was compiled in a survey by the Japanese Ministry of Labor, which was asked by over seventy percent of the companies to tell them how to avoid "unnecessary trouble."[139] Whether this indicates an interest in finding ways to comply with American employment practices or ways to avoid what appears to be an alien and unacceptable style of employment is unclear. It is interesting to note that Japan has recently passed a new equal employment opportunity law which covers private sector employment.[140] This

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[137] Announcement of IBM, Fujitsu dispute resolution by the American Arbitration Commercial Arbitration Tribunal in the Matter of IBM (claimant) against Fujitsu, Ltd. (respondant and counter claimant), Arbitration Report, Sept. 15, 1988 (on file with author); Arbitration Report in the Matter of IBM v. Fujitsu, N.Y. Times, Sept. 16, 1987 at D17.

[138] Wall St. J., Sept. 28, 1989 at 1.

[139] *Id.*

[140] An Act for the Adjustment of Laws Relating to the Ministry of Labor to Promote the Assurance of Equality of Opportunity and Treatment for Men and Women in Employment, amending the Working Women's Welfare Law, Law 113, 1972 (on file with author).

law prohibits outright gender discrimination in job training, benefits, retirement, and dismissal due to marriage or maternity.[141] The legislation also *urges* firms to equalize recruitment, hiring, job assignment, and promotion practices.[142]

B. *The Need for a Job Analysis*

The *Avagliano* decision did not consider the results of a job analysis of the skills actually applied in the various non-secretarial positions within SCOA. A job analysis is a technique used to determine what knowledge, skills, and behaviors are required for a particular job. It is a systematic study resulting in the development of an appropriate selection procedure,[143] and is widely used for any job or group of jobs for which an employer hires a large number of people.[144] There are certain considerations in developing a job specification for EEO purposes: setting the required skills at the level of a beginner on the job, so that a majority of applicants, including minorities and women previously excluded from the job, are not disqualified; ensuring that every standard specified has been proven to be a valid requirement for the job.

The U.S. Equal Employment Opportunity Commission (EEOC) and the courts scrutinize the following specifications very closely: height and weight limits with an adverse impact on women and some minorities; experience requirements; skill requirements; and educational requirements.[145] The EEOC wants employers to evaluate all job qualifications to ensure that there are no excessive or unnecessary requirements that might have the effect of disproportionately screening out minorities and women.[146] A job analysis would have been useful to enable the district court to understand the functions of Sumitomo America's executive, managerial, and sales staff to determine whether knowledge of Japanese language and customs, as well as prior experience, are BFOQs for non-secretarial positions in the U.S. subsidiary's offices. A job analysis

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[141] *Id.*

[142] Edwards, *Equal Employment Opportunity in Japan: A View from the West*, 41 INDUS. & LABOR REL. REV., 240, 242 (1988).

[143] M. MINER & J. MINER, EMPLOYEE SELECTION WITHIN THE LAW 83 (1978).

[144] *Id.* at 326.

[145] *Id.* at 328–29.

[146] *Id.* at 329; *see also* 2 CONNELLY & CONNELLY, A PRACTICAL GUIDE TO EQUAL EMPLOYMENT OPPORTUNITY, Appendix A at 27–30 (rev. ed 1979) (Guidelines for Selection of Candidates for Pre-Supervisory Training, especially "Description of Job Element and Position Specification").

conducted in Japanese and English would have been required. Such an analysis would also have enabled the district court and other U.S. courts to understand Japanese multinational business practice and Japanese labor relations law and practice in order to determine whether Sumitomo America and other foreign-owned subsidiaries intentionally discriminate against American employees.

VIII. Recent Developments

A. *EEOC Policy Guidance*

In the aftermath of *Avagliano*, the EEOC has issued policy guidance concerning the applicability of Title VII to foreign and multinational corporations in the United States and to U.S., foreign, or multinational corporations abroad.[147] The policy guidance also covers charges by foreigners employed in the U.S. including those doing only part of their work in the U.S.[148]

The policy guidance contains a statutory construction of Title VII indicating that congressional intent was to "remove obstacles to the free flow of commerce among the States and with foreign nations and to guarantee the complete and free enjoyment by all persons of the rights, privileges and immunities protected by the Constitution of the United States," except for the employment of foreigners outside any state.[149] The EEOC statement notes that Title VII contains no exemption from coverage for foreign employers.[150] Thus, the EEOC specifically adopted the U.S. Supreme Court's decision in *Avagliano* that a company incorporated in the United States is subject to Title VII, notwithstanding the FCN Treaty.[151]

The policy guidance requires that the EEOC review the status of the individual filing the charge, the status of the employer and the status of the country with respect to any treaty provisions. Both aliens and non-aliens working in the U.S. are covered.[152] Where discrimination takes place in the U.S., Title VII applies to both

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[147] EEOC Policy Guidance on Title VII Charges Against Foreign Companies and U.S. Employers Overseas, 183 Daily Lab. Rep. (BNA), Sept. 21, 1988 at D-1 [hereinafter EEOC Policy Guidance].

[148] *Id. See* Boureslan v. Aramco, 892 F.2d 1271 (5th Cir. 1990) (en banc) (8–5 decision) (Majority held that Title VII does not apply extra-territorially; strong dissent by King, J.).

[149] 110 Cong. Rec. H2737 (daily ed. Feb. 10, 1964) (statements of Rep. Libonati during debate on Title VII passage).

[150] EEOC Policy Guidance, *supra* note 116, at D-1.

[151] EEOC Decision No. 86-2, Empl. Prac. Guide (CCH) ¶ 6860 (Nov. 22, 1985).

[152] *Id.*

American and foreign companies.[153] In the EEOC view, by invoking the benefits and protections of U.S. law by employing people here, an employer should expect to be subject to the U.S. enforcement process with respect to charges of discrimination arising directly from business done in the United States.[154]

The EEOC policy states that the following criteria are to be applied to determine a corporation's nationality:

> a) nationality of control, *i.e.*, nationality of the individual or company that controls the business;
> b) principal place of business, *i.e.*, place where primary factories and offices are located;
> c) place of incorporation;
> d) voting control nationality, *i.e.*, identity of persons holding voting stock;
> e) dominant shareholders' nationality; and
> f) nationality of the management, *i.e.*, of the officers and directors.[155]

These factors are to be applied case by case, with equal weight given to each. Determination of nationality is important in determining whether a corporation is exempt from Title VII based on a FCN Treaty provision.

B. *Wickes v. Olympic Airways*

In a recent age and national origin employment discrimination suit, *Wickes v. Olympic Airways*, brought against a Greek company under Michigan state law, the district court held the suit to be barred by the U.S.–Greece FCN Treaty.[156] On appeal, the Sixth Circuit Court of Appeals stated that this FCN Treaty "does not give foreign corporations the broad right to violate our anti-discrimination laws in their hiring practices," but only a "narrow right to discriminate in favor of Greek citizens in filling managerial and technical positions within the company's American-based offices."[157] In this instance, Olympic Airways, which is owned by the Greek government, maintained an unincorporated office in the United States.[158]

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[153] *See* Ward v. W & H Voorman, 685 F. Supp. 231 (M.D. Ala. 1988).
[154] EEOC Decision No. 84-2, Empl. Prac. Guide (CCH) ¶ 6840 (Dec. 2, 1983).
[155] EEOC Policy Guidance, *supra* note 116, at III.B(b).
[156] 745 F.2d 363 (6th Cir. 1984).
[157] *Id.* at 364.
[158] *Id.*

The Sixth Circuit Court of Appeals relied on the U.S. Department of State's interpretation of the FCN Treaty.[159] The court followed the State Department's recommendation and rejected Olympic's argument that the Treaty gave Olympic the right to hire Greek nationals in lieu of Americans at all levels in the U.S. operation and to be exempt from Title VII at all levels. The amicus brief submitted by the United States stated:

> Under Olympic's interpretation it would have an absolute right to hire white Americans over black Americans solely on the basis of race, American males over American females solely on the basis of sex, and Protestant Americans over Jewish Americans solely on the basis of religion. In short, Olympic's position, if adopted, would undermine fundamental state and federal policy without advancing even remotely the purposes underlying the Treaty. The drafters of the Treaty could not have intended this result.[160]

The Sixth Circuit interpretation did provide Olympic with some freedom to favor Greek citizens for certain positions,[161] but gave Olympic "no license to discriminate against [the] non-Greek citizens it hires"[162] for positions not covered by the FCN Treaty, such as managers, executives, and professionals. The court granted that the language of the Treaty gave Olympic only "a narrow privilege to discriminate" on the basis of the "of their choice" language similar to that found in the U.S.–Japan FCN Treaty.[163]

C. *The Next Horizon: Business Necessity or BFOQ?* MacNamara v. Korean Air Lines

In *MacNamara v. Korean Air Lines*,[164] an American citizen who had been promoted from salesman to district sales manager for Delaware, Pennsylvania, and southern New Jersey was dismissed at the age of fifty-seven.[165] The employer, Korean Air Lines (KAL), a non-U.S.-incorporated branch of a foreign company, replaced a total of six American managers nationally with four Korean citizens in a reorganization. The Korean citizen who replaced the plaintiff

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[159] *Id.* at 365.

[160] Brief for the United States as Amicus Curiae, Wickes v. Olympic Airways, cited in EEOC Policy Guidance, *supra* note 116, at D-2.

[161] *Wickes*, 745 F.2d at 367.

[162] *Id.* at 369.

[163] *Id.* at 367–68.

[164] *MacNamara*, 45 Fair Empl. Prac. Cas. (BNA) 384 (E.D. Pa. 1987).

[165] *Id.*

was a forty-two year old who had been in charge of KAL's Washington, D.C. office.[166] The plaintiff filed suit against KAL in November, 1982, alleging violations of Title VII, the Age Discrimination and Employment Act (ADEA),[167] and the Employment Retirement Income Security Act of 1974 (ERISA).[168] KAL argued in the district court that the "of their choice" language in the U.S.–Korea FCN Treaty, similar to that found in the U.S.–Japan and U.S.–Greece treaties, gave it the right to employ executives of its choice without imposition of American anti-discrimination statutes.[169] The district court agreed, holding that the U.S.–Korea FCN Treaty gives Korean corporations the right to select Korean nationals holding Treaty Trader status as executive personnel, without regard to American employment laws.[170] In granting summary judgment to KAL, the district court stated that any conflict between the FCN Treaty's "of their choice" provisions and Title VII should be resolved legislatively by the Congress, not by the courts.[171]

The district court reasoned that the signatory countries to the FCN Treaty intended the Treaty to assure foreign corporations of their ability to manage investments in the host country without interference.[172] The reasoning, while not stated in terms of a Title VII business necessity defense, could offer a foreign-owned corporation a liberal standard under Title VII in lieu of the more stringent BFOQ standard. This reasoning might support a justification for hiring employees based on foreign language, custom, and even citizenship if such preferences were "reasonably necessary to the successful operation of its business" in the United States.[173]

Because the intent of the FCN Treaty was to enable businesses from signatory nations to conduct business on an equal footing with local business, the ability to control their operations with higher

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[166] *Id.* at 384, 388.

[167] 29 U.S.C. § § 621–634 (1967).

[168] 29 U.S.C. § 101 *et seq.*

[169] *MacNamara*, 45 Fair Empl. Prac. Cas. (BNA) at 384.

[170] *Id.* at 390.

[171] *Id.* at 391. It must be noted that EEOC Policy Guidance discussed elsewhere in this article has indeed provided direction concerning the effect of Title VII when there is an FCN Treaty between the U.S. and the country of a foreign multinational parent.

[172] MacNamara v. Korean Air Lines, 863 F.2d 1135, 1138 (3rd Cir. 1988) *cert. denied*, 110 S. Ct. 349 (1989).

[173] *Id.* at 1139. This echoes the new standard of Title VII considered by the Second Circuit in *Avagliano*, but avoided by the U.S. Supreme Court. *See* Avigliano v. Sumitomo Shoji America, Inc., 638 F.2d 552, 559 (2d Cir. 1981). *See also* Street, *Application of U.S. Fair Employment Laws to Transnational Employers in the United States and Abroad*, 19 N.Y.U. J. INT'L L. & POL. 357, 388 (1987).

echelon executives of their choice makes sense. Under Title VII, business necessity may be employed as a rationale for overcoming the requirements of equal employment opportunity laws. This is done by showing that actions taken were intended to facilitate business, not to discriminate. The district court's reliance on this provision of the FCN Treaty, echoing the court in *Avagliano*, may result in a new standard for multinational employers' branch staffing, if not for actions taken by U.S.-incorporated subsidiaries.

In *MacNamara*, the Third Circuit Court of Appeals tried to reconcile the *Spiess*, *Avagliano*, and *Wickes* decisions.[174] The appeals court's decision agreed with the Fifth and Sixth Circuits that Article VIII(1) of the FCN Treaty goes beyond securing treatment equal to that of domestic companies, and instead assures foreign corporations that they may have their businesses in host countries managed by their own nationals, if they choose.[175] The court of appeals also agreed with the Sixth Circuit Court of Appeals that Article VIII(1) was not intended to provide foreign businesses shelter from any domestic employment laws except for those which conflict with their rights to select their own nationals as managers because of their citizenship. The court saw no conflict between Title VII, the ADEA, and rights conferred by Article VIII(1).[176] On the other hand, the Third Circuit opinion in *MacNamara* reconciled a conflict between Title VII and the ADEA and Article VIII when disparate impact occurs due to citizenship and other factors on older managers, a particular racial group or persons whose ancestors are not from the foreign country involved in favor of Article VIII(1).[177]

The Third Circuit interpreted the objective of Article VIII(1) to have been to overcome legislation that forced foreign employers to hire host country personnel, thus freeing them from domestic laws using citizenship as a criterion, but "subject generally to other legally imposed criteria."[178] The court arrived at the same conclusions as the *Wickes* court, that the post-War FCN Treaties were negotiated during a period of "percentile" restrictions which required American companies operating abroad to hire a certain percentage of citizens of a host country.[179] The treaties enabled

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[174] *MacNamara*, 863 F.2d 1135 (3d. Cir. 1988).
[175] *Id.* at 1141.
[176] *Id.* at 1140–41.
[177] *Id.* at 1148.
[178] *Id.* at 1144.
[179] *Id.*

companies to hire people in whom they had the most confidence,[180] in order to facilitate "operational success in the host country."[181] In the court's view, Article VIII(1) reflected the negotiators' understanding that personnel decisions would otherwise remain subject to domestic legislation not inconsistent with the right to hire one's own citizens.[182]

The court of appeals' opinion in *MacNamara* adopts the U.S. Supreme Court's view expressed in *Avagliano* that the purpose of the FCN Treaty was not to give foreign corporations greater rights than domestic corporations, but instead to free them from "discrimination based on their alienage."[183] In accordance with the State Department's amicus brief in *MacNamara*,[184] the appeals court interpreted the Supreme Court's decision to mean that equality does not provide immunity from domestic laws to which domestic employers are held but only the right of a foreign corporation to employ its own citizens.[185] The court would thus extend Title VII coverage to branches which are not incorporated in the U.S. and which do not avail themselves of the protections and benefits of U.S. laws.

In contrast to the Second Circuit Court of Appeals in *Avagliano*, the Third Circuit viewed national origin discrimination and citizenship discrimination as different. Citizenship discrimination is not barred under Title VII, while national origin discrimination is. The Third Circuit rejected the modified application of the BFOQ standard proposed by the Second Circuit Court of Appeals, because the BFOQ is only triggered when intentional discrimination has been identified.[186] The court found that the burden under that standard of BFOQ, whether the use of foreign managers is reasonably necessary to the success of a foreign business in the U.S., is more difficult to meet than when the issue is only whether an employer favored its own citizens. In the Third Circuit's view, a plaintiff whose claim is that a foreign corporation has chosen one of its own citizens

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[180] *Id.* (citing Wickes v. Olympic Airlines, 745 F.2d 363, 367–68 n.1. (6th Cir. 1984)).

[181] *Id.* at 1145.

[182] *Id.*

[183] *Id.* at 1146 (citing Avagliano v. Sumitomo Shoji America, Inc., 457 U.S. 176, 187–88 (1982)).

[184] *Id.*, citing Kolovrat v. Oregon, 366 U.S. 187, 194 (1961), which stated that "[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."

[185] *Id.*

[186] *Id.* at 1146–47 n.14.

as an executive on the basis of citizenship is no more likely to prevail than any other employment discrimination plaintiff trying to prove that an employment decision was made for a different, impermissible reason.[187]

Due to the absence of a conflict between Article VIII(1), the ADEA, and Title VII, the court held that the district court had been in error in concluding that MacNamara's intentional disparate treatment claims could not be heard.[188] The court rejected, however, the right of the plaintiff to show disparate impact absent intent to discriminate with respect to an employer with an essentially homogeneous population. The court held that disparate impact cannot be reconciled with Article VIII(1), and that MacNamara could not proceed with any claim that KAL violated Title VII by replacing its Caucasian-American sales managers with Korean citizens absent a showing of subjective *intent* to discriminate illegally.[189] The Supreme Court has denied certiorari to MacNamara.

IX. Conclusion: Two Crucial Issues

A. *Title VII, American National Origin, and Job-Relatedness*

A crucial question to be answered is: "[t]o what degree are the locally incorporated subsidiaries of Japanese trading companies marketing to the U.S. market or buying products in the U.S. to export to Japan?"[190] It has been stated, for example, that "C. Itoh and Co. (America) does annual business of over $1 billion, of which approximately 65 per cent constitutes exports from the United States to Japan and other countries, and 35 per cent involves imports from Japan and other countries."[191] The key questions for a job analysis are: from whom products for export to Japan are purchased; whether knowledge of the American market and English language is necessary for such purposes; and, to what extent knowledge of the Japanese market is essential to those transactions. It appears from limited statistical information available that the American subsidiaries of Japanese corporations have extensive business relations with many large and small American firms. For example, Sumitomo America "has more than 10,000 American cus-

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[187] *Id.* at 1147.
[188] *Id.*
[189] *Id.* at 1148.
[190] *See* Sethi and Swanson, *supra* note 74.
[191] *Id.* at 497.

tomers, including about half of the top 200 on the *Fortune* list of 500 leading companies . . . although the bulk of these subsidiaries' transactions remain trade with Japan, particularly with the parent firms."[192] While the bulk of the trading companies' transactions are exports to the parent company, it is unclear whether they are purchasing from American or Japanese sources in the United States. Where knowledge of American business practices and English language are required to perform the job, the liberalized BFOQ expressed by the Second Circuit may not be appropriate. Detailed analysis of job functions and subsidiary operations of trading companies and other foreign-owned businesses will be required to answer these questions.

The answers may provide a limited BFOQ exception or a business necessity defense with respect to essential employees dealing with other Japanese branches and the parent company where there is no availability of such persons in the American labor market. The Second Circuit decision did not take into account the pool of non-Japanese M.B.A.'s, J.D.'s and other qualified employees with a knowledge of Japanese language, business and culture available locally who could communicate with Japanese and American customers and with the home office. During the postwar period many Americans received Japanese language and area training. Many others have been trained in cross-cultural business and law programs. Some of these programs have included traineeships in Japanese corporations and law firms, enabling participants to become familiar with Japanese corporate operations. A liberalized BFOQ or business necessity defense may not be appropriate until this pool has been exhausted.

B. *The Spectre of the Fleeing Multinational*

While agreeing with American courts' interpretations that the FCN Treaty's "of their choice" provision does not apply to locally incorporated subsidiaries, the Japanese Ministry of Foreign Affairs noted:

> The encouragement of mutually beneficial investments between the two countries is an important object and purpose of the FCN Treaty and, in this regard, hopes that the Sumitomo case

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[192] A. Young, *supra* note 79, at 205.

> will settle in such a way as not to discourage sound activities of subsidiaries of Japanese companies in the United States.[193]

Similarly, the Japanese External Trade Organization's amicus brief in *Avagliano* expressed the fear that:

> an affirmance of the decision of the court below will tend to discourage such mutually beneficial investment insofar as that decision imposes the structures of Title VII . . . to limit the right of Japanese investors to control and manage their enterprises in the United States with home country executive personnel of their choice, as authorized by Art. VIII(1) of the Treaty of Friendship, Commerce and Navigation between the United States and Japan.[194]

American courts must decide whether to permit foreign-owned U.S.-incorporated subsidiaries, considered by the Supreme Court to be companies of the United States, the privilege to be subject to modification of standards applied to domestic companies. The courts' decisions may be influenced by the policy consideration that these subsidiaries bring investments into the U.S. economy. A further question is whether branches of foreign parent companies should be exempt from civil rights laws because the FCN Treaty's provisions supersede domestic law. These difficult problems occur in other host countries dealing with the phenomenon of investment by multinational enterprises. Where local regulations are viewed as excessive by multinationals, management may move to friendlier regulatory climes in more cooperative nations. One writer suggests that the proper solution is an economic balancing act: "As these countries are rational, . . . they will raise their controls to the point where the gains from the controls are no greater than the cost."[195]

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[193] Brief of Amicus Curiae for the United States, *supra* note 109, at Appendix B at 15a. (Text of Cable from the United States Embassy in Tokyo to the Secretary of State, received February 26, 1982 reporting the Japanese Ministry of Foreign Affairs' position in *Avagliano v. Sumitomo*).

[194] Brief of Amicus Curiae for the Japan External Trade Organization, *supra* note 75, at 2.

[195] R. TINDALL, MULTINATIONAL ENTERPRISES; LEGAL AND MANAGEMENT STRUCTURES AND INTERRELATIONSHIP WITH OWNERSHIP, CONTROL, ANTITRUST, LABOR, TAXATION AND DISCLOSURE 132, 183 (1975). *See also* M. TOLCHIN & S. TOLCHIN, BUYING INTO AMERICA 174 (1988) ". . . Some of these adamantly anti-union, foreign-owned U.S. companies not only build their manufacturing facilities in nonunion states and regions (not unlike some domestic companies) but threaten to close their doors in the event their employees unionize and, indeed, leave the country . . . ."; BERGSTEN, HORST & MORAN, AMERICAN MULTINATIONALS AND AMERICAN INTERESTS 100:

Finally, labor is intensely concerned over the effect on its bargaining position of the internationalization of business. Blue-collar is essentially immobile, internationally. And labor

While reducing regulation may be possible from a government policy standpoint, it may not be possible in the United States, where case law holds that a treaty does not supplant domestic law,[196] and the EEOC has promulgated policy upholding the *Avagliano* decision. The Supreme Court's view that a locally incorporated subsidiary is an American company[197] indicates that subsidiaries will continue to be treated as domestic corporations with respect to employment practices. Whether holdings such as *Avagliano* are remnants of a former, more affluent period of American legal history or are immutable will be left to the courts and legislators to decide[198] with respect to the exact standards to be applied to employees at various levels of the U.S. organization for purposes of hiring and promotion.

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is almost wholly immobile across oceans and between northern and southern hemispheres, for reasons of both geographical distance and cultural (including linguistic) differences. Capital and management, on the other hand, are highly mobile across national boundaries. Runaway plants can now run halfway around the globe, but strikes by national unions affect only portions of the earnings of a multinational, in contrast to the total earnings of a firm that operates completely within a single country.

[196] United States v. R.P. Oldham Co., 152 F. Supp. 818 (N.D. Cal. 1957).

[197] Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 182–183 (1982).

[198] *See* Note: *Japanese Corporation Formed Under United States Law Must Comply with Terms of Title VII of the Civil Rights Act of 1964*, 13 GA. J. INT'L & COMP. L. 159, 175–76 (1983) ("In not responding directly to the peripheral issues addressed by the Second Circuit in *Avigliano*, the Supreme Court, for the present time, may have avoided a potential international controversy with an important economic ally, however the employment discrimination issues raised in this case will not disappear and cannot be avoided in a world increasingly dependent on its political and economic relations").